

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ROBERTO ARMENDARIZ-LOZANO	§	
v.	§	CIVIL ACTION NO. 6:08cv228
		(Crim. No. 6:07cr68-1)
UNITED STATES OF AMERICA	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Movant Roberto Armendariz-Lozano, proceeding *pro se*, filed this motion to vacate or correct sentence under 28 U.S.C. §2255 complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Armendariz was convicted on December 14, 2007, on his plea of guilty to one count of being a criminal alien unlawfully in the United States after deportation. He received a sentence of 70 months in prison. Armendariz did not take a direct appeal, but filed this motion to vacate or correct his sentence on June 5, 2008.

In his motion, Armendariz said that his sentence violated due process because the offense with which he was charged carries a sentence of no more than 24 months, and the enhancement statute was overbroad; the trial court lacked jurisdiction to sentence him to 70 months because the crime carries a maximum term of 24 months and his offense level score should have been 5 instead of 21; the Government failed to provide him with a copy of the pre-sentence investigation report 35 days in advance of sentencing; and he received ineffective assistance of counsel in that his attorney, Federal Public Defender Kenneth Hawk, failed to object to the untimely report and to the excessive sentence.

The Government was ordered to answer and did so, and Armendariz filed a response to the answer. After review of the pleadings, the Magistrate Judge issued a Report on February 3, 2009, recommending that the motion to vacate or correct sentence be denied. The Magistrate Judge examined the testimony at the change of plea and sentencing proceedings and determined that because Armendariz had been previously convicted of a felony drug trafficking crime under the Controlled Substances Act, the maximum sentence was not 24 months but 240 months under 8 U.S.C. §1326(b), and so the trial court did not lack jurisdiction. The Magistrate Judge also determined that Armendariz's contention that the pre-sentence report was not delivered timely lacked support in the record, his contention that the sentencing statute was overbroad was without merit, and that Armendariz did not receive ineffective assistance of counsel. The Magistrate Judge therefore recommended that the motion to vacate or correct sentence be denied and that Armendariz be denied a certificate of appealability *sua sponte*.

Armendariz filed a motion for extension of time in which to object, saying that he received the Report on February 9, 2009. The Magistrate Judge granted this motion, granting Armendariz until March 10, 2009, in which to file such objections as he may have. To date, no objections have been received; accordingly, Armendariz is barred from *de novo* review by the district judge of those findings, conclusions and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings and records in this cause as well as the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled motion to vacate or correct sentence be and hereby is DISMISSED with prejudice. It is further

ORDERED that the Movant Roberto Armendariz-Lozano is hereby DENIED a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

SIGNED this 16th day of March, 2009.


MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE